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INTEREST OF THE AMICI CURIAE*

The National Center for Missing and Exploited Children, the national non-profit resource center for child protection established in 1984, spearheads national efforts to locate and recover missing children, and raises public awareness about ways to prevent child abduction, molestation, and sexual exploitation.

The National Law Center for Protection of Children and Families, a national non-profit law center and clearinghouse which focuses upon legal and research issues surrounding child sexual exploitation and illegal pornography, concentrates on the enforcement of existing laws, the promulgation of the new ordinances and legislation, the defense of such legislation and public/professional education in the areas of sexual exploitation and illegal pornography.

National Coalition Against Pornography is a national non-profit organization which seeks to eliminate child pornography and illegal obscenity city by city across the entire United States through building broad coalitions, raising public awareness and facilitating legal and legislative action.

National Family Foundation is a non-profit organization which was organized to collect, synthesize, and integrate medical, clinical, and social science evidence and theory to bring greater understanding and solutions to the problems of the American children and families.

Athletes for Kids is a non-profit organization representing over 200 professional athletes and dozens of corporate leaders nationwide who have joined together with a common purpose of educating young people about the harms of pornography, drug abuse, and illicit sex.

SUMMARY OF ARGUMENT

A careful examination and comparison of the present facts to three important areas: (1) the nature of pedophilia,

* A complete description of Amici may be found in the appendix. This brief is submitted with the written consent of both parties, filed with the clerk of this Court.

(2) its underground, secretive network and (3) the uncontroverted link between child pornography and child molestation, will highlight petitioner's predisposition to purchase child pornography and the necessity of reverse stings to pierce the network and help stop the multi-faceted harm to children from child pornography. Pedophiles (persons with a sexual preference for children) and child molesters have many common characteristics. The most pervasive is their use, obsession with, and collection of child pornography and child erotica. Such pornographic material is essential to them for personal stimulation, seduction of children, teaching tools and blackmail to keep their child molestation secret. The network in which pedophiles and child molesters operate to obtain child pornography is now underground, secretive and cautious of unknown individuals. Due to aggressive enforcement, and the nature of the underground pedophile network, traditional investigative techniques, such as purchasing the materials or detecting the producers, has become virtually impossible. Only "reverse stings," where the undercover agent poses as foreign child pornographers, have proven successful to pierce the shroud of secrecy and detect such crimes against children. "Government undercover operations [reverse stings] are severely needed to prevent and deter those who . . . purchase . . . child pornography." *United States v. Moore*, 916 F.2d 1131, 1138 (6th Cir. 1990).

This Court has recognized in *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. —, 110 S.Ct. 1691 (1990), the serious, multiple harms to children caused by child pornography and strongly recognized the state's "compelling" interest in protecting child victims from child pornography. Since child pornography is child molestation in pictures and in progress—i.e., crime scene photographs—all legitimate avenues must be explored to eliminate child pornography.

Despite the overwhelming evidence to the contrary, petitioner has requested this court to overturn the jury's rejection of the entrapment defense and hold as a matter

of law that he was entrapped into purchasing child pornography. First, a jury verdict which rejected the entrapment defense may be overturned *only if no reasonable jury* could have found that the government proved predisposition to commit the crime. Second, lack of predisposition is demonstrated only where the government manufactures, not detects, the criminal intent to buy child pornography. In essence, the government merely gave Jacobson the opportunity to exercise his predisposition to purchase child pornography. They did not implant the criminal thought or force the illegal conduct.

Clearly, eight positive responses indicating Jacobson's interest in child pornography and his *two*, not one, purchases of child pornography provide ample evidence of his predisposition. His prior order of *Bare Boys I and II* from a known pornography distributor, his expressed interest in teenage and pre-teenage sexual activity, and his eagerness to receive the explicit sex catalogs and order from them illustrate, at the very least, that Jacobson was not reluctant to commit the child pornography offense. He rose to the bait, repeatedly and without reluctance, where any normal person would have thrown the mailings away, asked that they be stopped, or filed a complaint with the authorities. His final order of *Boys Who Love Boys*, described in the catalog as "eleven year old and fourteen year old boys who get it on in every way possible—oral, anal sex and heavy masturbation," leaves little doubt that he knew what he was doing and was predisposed to purchase such material.

Reverse sting investigations in federal child pornography cases have provided the most effective method to detect and stop the purchase and use of child pornography. Hundreds of individuals, most undoubtedly pedophiles or child molesters, who have been convicted over the past five years, would not have been detected nor caught with traditional investigative methods. The secretive underground network, which distributes and buys child pornography, is a continuing threat to children and can and must

be pierced by "reverse stings" to prevent further sexual abuse of children from child pornography.

ARGUMENT

I. THE SECRETIVE, UNDERGROUND PEDOPHILE AND CHILD MOLESTER NETWORK AND ITS DESPERATE NEED FOR CHILD PORNOGRAPHY REQUIRES LAW ENFORCEMENT TO USE UNDERCOVER STINGS TO DETECT CLANDESTINE CRIMES AGAINST CHILDREN

The very nature of pedophilia and the use of child pornography is so unique that it led the Attorney General's Commission on Pornography in 1986 to say that "because the problem of child pornography is so inherently different from the problems relating to the distribution of legally obscene material, it should be no surprise to discover that tools designed to deal with the latter are largely ineffective in dealing with the former."¹ Law enforcement has discovered that the normal investigative techniques employed against even distributors and consumers of adult pornography are not generally successful against distributors or consumers of child pornography.²

To properly understand the absolute necessity for undercover tactics and mail order reverse stings in child pornography cases, it is critical to first comprehend three important things:

- (1) the nature of pedophilia and child molestation;
- (2) the workings of the secretive, underground pedophile and child molester network; and
- (3) the direct connection between child pornography and child molestation, and its link in the circular chain of child sexual victimization.

A comparison of the present facts to these three areas will hopefully enlighten the Court concerning Jacobson's

¹ Attorney General's Commission on Pornography, Final Report, July, 1986, p. 410 [hereinafter *Commission on Pornography*].

² *Id.* at 406.

predisposition and the necessity of reverse stings to stop the multi-faceted harm to children from child pornography.

A. Pedophiles And Child Molesters Are Obsessed With Child Pornography And Thus Have A Unique Predisposition To "Reverse Stings."

Law enforcement, media, and the public often use *pedophile* and *child molester* interchangeably; however, they are not synonymous terms. The term *pedophilia* is commonly used to mean "a sexual perversion in which children are the preferred sexual objects." Technically, however, pedophilia is a psychiatric disorder defined as essentially "recurrent, intense, sexual urges and sexually arousing fantasies, of at least six months' duration involving sexual activity with children."³ While all pedophiles have a sexual preference for children, they can and do have sex with adults and span the full spectrum from saint to monster. A child molester, however, may not have a sexual preference or fantasy for children, but may sexually abuse children due to availability, avoidance of sexually transmitted disease from adults, curiosity, or desire to hurt a loved one of the molested child. On the other hand, a pedophile may not act out his fantasies or preference for having sex with children and thus not become a child molester.⁴

One common characteristic of both pedophiles and child molesters is the *use and consumption of pornography*. As one FBI behavioral scientist has said: "Child pornography exists primarily for the consumption of pedophiles. If there were no pedophiles, there would be little or no child pornography"⁵

A 1983 study by Dr. William Marshall revealed that eighty-seven percent (87%) of child molesters of girls and

³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 271 Section 302.20 (3rd ed. 1980).

⁴ K. Lanning, *Child Molesters: A Behavioral Analysis* 1-3 (2d ed 1987) [hereinafter *Child Molesters*].

⁵ *Id.* at 18.

seventy-seven percent (77%) of child molesters of boys admitted regular use of pornography. Pornography was reportedly used for three main purposes:

- (1) to stimulate the viewer or child molester;
- (2) to destroy or lower the natural inhibitions to sexual activity in their intended child victims; and
- (3) to teach children to imitate the conduct in their real life sexual encounter with an adult.⁶

According to the Congressional Subcommittee on Child Pornography and Pedophilia, "no single characteristic of pedophilia is more pervasive than the obsession with child pornography."⁷ In short, pedophiles and child molesters crave and use child pornography and are real, continuing threats to children.

Another common trait identified through research and law enforcement experiences is that both pedophiles and child molesters are *collectors of child pornography and child erotica*.⁸ These sexually explicit collections are always kept in secret, often catalogued and well organized, and generally used for stimulation, seduction, validation of the

⁶ W. Marshall, *Report on the Use of Pornography by Sexual Offenders, Report to the Federal Department of Justice, Ottawa Canada* (1983) see also W. Marshall, *Use of Sexually Explicit Stimuli by Rapists, Child Molesters and Non-Offenders*, 25 J. of Sex Research 267-288 (1988).

⁷ U.S. Senate, Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, *Child Pornography and Pedophilia*, 99th Cong., 1st Sess. (1986) (Available at the U.S. Government Printing Office, Washington, D.C.) 46 [hereinafter *Child Pornography and Pedophilia*].

⁸ *Child Molesters* at 17. Child erotica, which is a broader and more encompassing term than child pornography, is any material, relating to children, that serves a sexual purpose. Child erotica can be published material on child development, man-boy love, nudism, personal advertisements, men's magazines, adult pornography advertisements, access to children, etc., and unpublished material such as diaries, letters, newsletters, telephone and address books. *Id.*

deviant behavior or blackmail of the victim to keep his secret.⁹

Once one understands this distinctive characteristic of pedophiles and child molesters, it is obvious that no one but a person predisposed to the use of child pornography would have answered any of the mailings sent by the postal inspectors. An ordinary citizen who was not predisposed would have: (1) thrown the material out, (2) contacted the postal authorities to stop any further delivery, or (3) approached the police about filing a complaint. The petitioner did none of the above, but answered all of the mailings in various affirmative ways. His persistence in corresponding to obtain child pornography is consistent with the single most pervasive characteristic of pedophilia: obsession with child pornography for use and collection.¹⁰

Pedophiles and child molesters have two additional important common traits: (1) *desired access to children*, and (2) *seduction rather than force for sexual exploitation of children*. Because of their excessive interest in children,

⁹ *Id.* at 17-18. Pornography (such as men's magazines) is initially shown to the child casually for "sex education" to raise the curiosity level of children who are often surprised and bewildered about the sex acts. Once adult pornography has convinced the child that sex is acceptable, even enjoyable, child pornography is introduced to show that other children participate in sexual activity with adults or peers. Continued showings of child pornography will lower the natural inhibitions of a child to a point where kissing and sexually touching of the child may be accomplished by the molester. Eventually, the seduction process progresses to more explicit activity between the child and adult or other children using child pornography as instructional aids. S. O'Brien, *Child Pornography*, 89-90 (1983). Finally, still photographs in a "modelling session," home video movies, or professional filming occur for blackmail, personal collection of memories, future stimulation, trade with other molesters, commercial sale, or use to seduce other child victims. D. Campagna and D. Poffenberger, *Sexual Trafficking in Children*, 118 (1988) [hereinafter *Sexual Trafficking*].

¹⁰ *Child Pornography and Pedophilia* at 4.

pedophiles will gravitate to boy scout leadership, day care work, school bus driving, etc., and will often frequent schoolyards, arcades, and shopping centers to socialize with children.¹¹ The abuser, by meeting the children on their own "turf," begins the process of seduction that leads to the abuse and eventually to continued activity in the underground network.

Significant characteristics of pedophilia and child molestation appear to be present in petitioner's situation. First, his access to the children comes through his more than ten years as a bus driver in a public school system. Second, *Bare Boys I* and *Bare Boys II* may not be child pornography but, under anyone's criteria, they are child erotica. There appears to be no other legitimate rationale for this petitioner owning pictures of naked boys other than for sexual stimulation. As stated previously, child molesters/pedophiles seem to be the only market for child erotica and child pornography. In fact, in a study conducted by the Los Angeles Police Department, child pornography and child erotica were categorized together as pornography because "... both types serve identical purposes" for the pedophile/child abuser: "to desensitize the child and lower his or her inhibitions."¹² After their investigation, the Senate's Permanent Subcommittee concluded, "The seizure (of child pornography/child erotica) often is the first indication that the recipient may be molesting children."¹³ Finally, Jacobson's expressed interest

¹¹ *Id.* at 11-15.

¹² R. Bennett, "The Relationship Between Pornography and Extra-familial Child Sexual Abuse", *The Police Chief*, 19 (February 1991). [hereinafter *Pornography and Child Sexual Abuse*]. The review of all arrests for sex crimes against children (extrafamilial child sex abuse cases) from 1980-1989 revealed that pornography was discovered in eighty-eight percent (88%) of cases, with child pornography recovered in over twenty-three (23%) of the cases. According to the study, "Clearly pornography is an insidious tool in the hands of the pedophile population. The study merely confirms what detectives have long known: that pornography is a strong factor in the sexual victimization of children." *Id.* at 19.

¹³ *Child Pornography and Pedophilia* at 37.

in teenage and pre-teenage sexual activity and his purchase of such sexually explicit material is clearly consistent with such uniquely characteristic traits.

B. The Underground Child Pornography Network By Its Secretive Nature Requires Innovative Reverse Stings To Infiltrate And Detect Child Pornography Crimes.

By knowing the intricate workings of the child pornography network and the indicia of membership in the network, the Court will better understand that only certain people will rise to the bait offered by the postal inspector or customs agent.

In *Ferber*, 458 U.S. at 747, child pornography became a serious separate crime which was easier to prosecute, and consequently, law enforcement has been aggressively investigating such offenders. Since *Ferber*, organized crime's commercial interest has waned and an underground "cottage" industry and clandestine pedophile network have taken over.¹⁴ The consumers of child pornography are often the producers of the material and/or the distributors of the material. The United States Senate's Permanent Subcommittee on Investigations concluded that "the distribution of child pornography in the United States is largely carried on by individual pedophiles, who produce this material and trade it among themselves or order it through the mail from other countries."¹⁵ "The greatest bulk of child pornography is produced by child abusers themselves in largely 'cottage industry' fashion,"¹⁶ and more than any single factor, this demands covert behavior by both the pedophiles and the police. Moreover, the producer is, in fact, a child abuser because the pro-

¹⁴ It should be noted that there still "... is a domestic commercial pornography industry, but it is quite clandestine, and not nearly as large as the non-commercial use of and trade in non-commercially produced sexually explicit pictures of children." *Commission on Pornography* at 409.

¹⁵ *Child Pornography and Pedophilia*.

¹⁶ *Commission on Pornography* at 410.

duction of "child pornography necessarily includes the sexual abuse of a real child."¹⁷

This underground network creates a serious problem for investigation and apprehension of these child abusers. The police cannot simply trace material back to a distribution point, or subpoena the records of a known publication company, and they certainly are unable to go door to door and ask Mr. and Mrs. Public if they consume child pornography. In order to ferret out the consumers, producers and distributors of child pornography, the police must be allowed to aggressively seek out this underground network. The most effective method of detecting such crimes is to enter one of the underground network channels. There are two identifiable channels of this network: "(1) the cottage industry and (2) a commercial network for child pornography, consisting to a significant extent of foreign magazines"¹⁸ These two facets are, however, irrevocably linked to one another to the detriment of the children pictured in the child pornography material.

Since most of the material presently being distributed by the magazines and videos is simply collections of non-commercially produced pedophile collections,¹⁹ without the initial abuse by the pedophile, there would be no non-commercial child pornography. Likewise, since pedophiles and child molesters are the only known consumers, there would also be very limited commercial child pornography distribution. This symbiotic, parasitic behavior by the producers, distributors, collectors, and users of child pornography is at the heart of the government's strategy in the

¹⁷ *Id.* at 406.

¹⁸ *Id.* at 408.

¹⁹ *Id.* at 408. These photographs are edited in some semblance of order and circulated as completed magazine issues. The production of the material first abuses the child when the sexual behavior occurs and is filmed, and then again when the pictures are traded, sold or distributed through the magazines.

"Project Looking Glass" and "Operation Borderline" reverse stings.²⁰

Petitioner contends that his responses to the postal inspector's mailings were innocuous and without sinister connotations. The evidence is, however, quite to the contrary. Child pornography and its distribution is a clandestine business and as such, is not only difficult to detect, but even when a suspect is detected, his secretive nature often makes investigation difficult because he is extremely cautious in his dealings with unknown individuals. It was not until after several contacts with the "overseas child pornography distributor" that petitioner let down his guard and ordered the child pornography. However, it was obvious throughout his correspondence that petitioner was very interested in the materials. He wanted information about teenage and pre-teenage sexuality and eventually ordered *Boys Who Love Boys* and other child pornography without there being any doubt as to the nature of the material. The petitioner cannot hide behind the common ploy of many child pornography collectors that his caution is actually a lack of interest or predisposition. Only those who are stimulated in some way by the child pornography would even consider responding.

²⁰ In the present case, the petitioner positively responded and ordered child pornography from these two undercover "reverse stings" conducted by the U.S. Postal Inspectors and U.S. Customs agents respectively. Such innovative investigative operations were pioneered because the traditional attempts to buy child pornography from sophisticated and cautious individuals involved with the underground pedophile and child molester network had been, for the most part, unsuccessful. Essentially, both "reverse stings" were set up as follows: (1) establish an overseas corporation posing as commercial child pornographers; (2) identify and mail inquiry letters and surveys to suspects from other pornography mailing lists or convictions for child sexual offenses; (3) if positive responses and requests for catalogs are received, mail a catalog describing the explicit sexual materials involving children; (4) process the order and monetary pre-payment for the child pornography to arrange for delivery and search; and, (5) make a controlled delivery of the child pornography with a search of the premises to immediately follow.

C. Child Pornography Is Directly Connected With Child Molestation.

The rapid growth of child pornography²¹ reveals a demand for material by individuals who are stimulated, even obsessed, by depictions of sexual activity with children. Law enforcement studies have verified that pedophiles and child molesters almost always collect child pornography and child erotica.²² A recent study of 1,400 child sexual exploitation cases reported in Louisville between July 1980 and February 1984 shows that a significant number of molestation cases involve child pornography.²³ Over forty major cases, involving twelve or more child victims, were studied in depth in Louisville and that research revealed that *all* involved various forms of adult pornography and, in most cases, child nudes and/or child pornography were found at the molester's premises.²⁴ "Detective William Dworin of the Los Angeles Police Department estimates that of the 700 preferential child molesters (pedophiles) in whose arrest he has participated during the last ten years, more than half had child pornography in their possession. About eighty percent (80%) owned [some type of] pornography."²⁵ Child pornography plays a central role in child molestation by pedophiles and child molesters, serving to justify their conduct, assisting them in seducing their victims and providing a means to blackmail the children they have molested in order to prevent exposure.

²¹ A U.S. Senate inquiry concluded that child pornography was a highly organized industry grossing several million dollars per year. S. Rep. 95-438, 2nd Sess. 42(1978). In recent years more than one million children have been photographed in sexually explicit poses or while engaging in sexual acts with adults or with other children. D. Scott, *Pornography, Its Effect On the Family, Community and Culture* 17 (1985).

²² *Child Molesters* at 17-25.

²³ *The Effects of Pornography on Children and Women*, Hearings before the Subcommittee of Juvenile Justice, Committee on the Judiciary U.S. Senate (testimony of John Rabun, for the National Center for Missing and Exploited Children, Sept. 12, 1984).

²⁴ *Id.*

²⁵ *Child Pornography and Pedophilia* at 40-60.

The connection between child pornography and child-molestation is graphically played out during the "seduction process" which involves the use of pornography as a method to lower inhibitions or as an instructional tool.²⁶ As one investigator detailed,

It was seduction. . . . Once the pedophile realizes that secret would be kept, the next time the children would visit, they would see another type of magazine, something like *Schoolgirls*, *Lolita* or, again, if you are a boy lover, something like *Piccolo*.

These magazines depict children in the act of sexual molestation, oral copulation, sexual intercourse, sodomy, fondling, and masturbation. When looking at this material, the children appear to be enjoying it. . . . [T]he children would look at the magazines or movies, videotapes, photographs of other children and would question, "Doesn't this hurt, isn't this wrong?"

And the pedophile would demonstrate that it doesn't hurt, that it's a good feeling, a tickling sensation. This is the beginning of the molestation.²⁷

In short, the cycle of sexual exploitation of children has at its center pornography for enticement, seduction,²⁸ instruction and blackmail.²⁹

²⁶ K. Lanning, "Collectors", in *Child Pornography and Sex Rings* 74 (A. Burgess ed. 1984).

²⁷ Lt. Thomas Rogers, testimony submitted to the Attorney General's Commission on Pornography, Washington, D.C. (November 20, 1985) (available at the National Archives in Washington, D.C.). See also *Report of Surgeon General's Workshop on Pornography and Public Health*, U.S. Department of Health and Human Services 13 (August 1986) [hereinafter *Surgeon General's Report*].

²⁸ O'Brien, *Child Pornography* 1, 89-90 (1983). See Also, *Commission on Pornography* at 138.

²⁹ See Burgess, Groth, and McCausland, *Child Sex Initiation Rings*, 51 *Amer. J. Orthopsychiat.* 110, 114 (1981). See also, *Sexual Trafficking*.

Even more alarming than the rising statistics of child sexual abuse³⁰ and its connection to child pornography is what researchers are now referring to as the *cycle of child victimization*.³¹ As previously discussed, most sexually exploited children are seduced into participating in sexual activity with adults. Some are missing children (runaways, throwaways, non-family abductions) who are exploited through prostitution and pornography, and some are relatives or children in the neighborhood of the molester.³² While no conclusive studies or statistics are available, it is clear that a significant number of sexually abused children become molesters if not treated early and adequately. According to Gary Bishop, a convicted homosexual pedophile who murdered five boys in order to conceal his sexual abuse of them,

For me, seeing pornography was like lighting a fuse on a stick of dynamite. I became stimulated and had to gratify my urges or explode . . . all boys became mere sexual objects. My conscience was desensitized and my sexual appetite entirely controlled by actions." He then goes on to tell how he sexually abused then killed his boy victims.³³ (emphasis added)

³⁰ Child sexual abuse continued to rise with a three fold increase occurring between 1980 and 1986, with 138,000 reported and confirmed cases of child sexual abuse in 1986. See National Center of Child Abuse and Neglect, Children's Bureau, U.S. Department of Health and Human Service, *Study of National Incidence and Prevalence on Child Abuse and Neglect* (1988 (NIS-2)). However, estimates of actual child sexual abuse greatly exceed 138,000. It is estimated that "one in three females and one in ten males will be sexually molested before the age of 18; and four million child molesters [are believed to] reside in this country." U.S. Department of Justice, *Network News* 7 (Fall 1985).

³¹ H. Davidson and G. Loken, *Child Pornography and Prostitution* 2-3, (National Center for Missing and Exploited Children 1987) [hereinafter *Child Pornography*]; *Child Pornography and Pedophilia* at 100-101.

³² *Child Molesters* at v-vi.

³³ V. Cline, *Pornography Effects: Empirical & Clinical Evidence* 15 (1988) (available from the Department of Psychology, University of Utah, Salt Lake City Utah 84112).

According to recent studies, homosexual and heterosexual child molesters average between thirty and sixty child victims respectively before being caught and preferential child molesters will sexually abuse an average of 380 children in their lifetime.³⁴ If even some of the 380 children become molesters who in turn sexually abuse 380 children, the exponential increase of sexual exploitation of the children in the second and third generations would be staggering. The Los Angeles Police Department reports that most child molesters (80%) were themselves molested as children and that they generally seek out victims of the same age and sex as when they were first molested.³⁵ Scientific research has verified this law enforcement study by finding that fifty-seven percent (57%) of the child molesters studied reported that they were themselves molested as children.³⁶

When the Court compares all the aspects of the case with the research data surrounding pedophiles and child pornography, the inescapable conclusion is that the petitioner acted as only a pedophile or child molester would act. Petitioner at anytime could have not responded or just said "no" to the solicitation mailings and been done with it all. But, instead, he chose to follow through to the end. The distribution and consumption of child pornography must be stopped, but due to its underground and secretive nature, the task presents significant obstacles. Certain law enforcement techniques, such as reverse stings, are essential to pierce the secretive network and ferret out those who would abuse or cause the abuse of our children through pornography.

³⁴ G. Abel, *Sexual Aggressive Behavior* (1986).

³⁵ *Child Pornography and Pedophilia* at 52-53.

³⁶ Carter, *Use of Pornography In the Criminal and Developmental Histories of Sexual Offenders*, Report to the National Institute of Justice and National Institute of Mental Health (1985) (hereinafter *Use of Pornography*); see also *Surgeon General's Report* at 13.

II. THE STATE'S INTEREST IN PROTECTING CHILDREN FROM BEING VICTIMIZED BY CHILD PORNOGRAPHY JUSTIFIES THE USE OF UNDERCOVER OPERATIONS TO IDENTIFY CONSUMERS OF CHILD PORNOGRAPHY

Less than a decade ago, this Court identified the prevention of sexual exploitation and abuse of children as constituting a government objective of surpassing importance. *Ferber*, 458 U.S. at 757. Previously, in *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944), this Court stated that "... a democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens."

The problem of harm to the victimized children from child pornography is well documented in research, law enforcement data and the decisions of this Court and should be considered in any balancing test. See, *Ferber*, 458 U.S. 747; *Osborne*, 495 U.S. —, 110 S.Ct. 1691.

A. Child Pornography Involves Substantial Harm To Children.

Considerable evidence has accrued over the years about the psychological and physical injuries inflicted on children as a result of their participation in child pornography.³⁷ The effect of being a subject in child pornography can be devastating.³⁸

³⁷ The *Ferber* Court explained *inter alia* as follows:

It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults [S]exually exploited children [are] predisposed to self-destructive behavior such as drug and alcohol abuse or prostitution" *Ferber*, 458 U.S. at 758 n.9.

³⁸ In western society there is virtual unanimity that early adult/child sexual activity causes harm to the child. See e.g., U.S. Dept. of Health and Human Services, *Child Sexual Abuse: Incest, Assault, Sexual Exploitation* 7 (1981); R. Holmes, *The Sex Offender and the Criminal Justice System* 91-103 (1983); Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289 (1980); R. Lusk

Child sexual abuse frequently results in identifiable behavioral changes caused by emotional distress.³⁹ However, fewer than six percent of these cases are reported.⁴⁰ Apparently, children fail to speak out about sexual molestation because they believe they did something wrong to bring about the abuse.⁴¹ Most disturbing is the discovery that children who are sexually abused are more likely when they reach adulthood to victimize young children, particularly their own.⁴² In fact, of all sexual crimes, the recidivism rate for pedophile offenders is second only to exhibitionists.⁴³

Among the physical injuries suffered by children in the production of pornography are sexually transmitted diseases.

How does a three and a half year old girl learn to cope with gonorrhea of the throat and a pain-

and J. Waterman, "Effects of Sexual Abuse of Children," in *Sexual Abuse of Young Children* 101-118 (K. MacFarlane and J. Waterman eds. 1986); Summit and Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 Am J. Orthopsych. 237 (1978).

³⁹ J. MacDonald, *Rape Offenders and Their Victims* 120-145 (1971); Halleck, "Emotional Effects of Victimization," in *Sexual Behavior and the Law* 684 (R. Slovenko ed. 1965); J. Landis, *Experience of 500 Children with Adult Sexual Deviation*, 30 Psychiatric Q. 100-103 (1956).

⁴⁰ Prager, *Sexual Psychopathy and Child Molesters: The Experiment Fails*, 6 J. Juv. L. 49,62 (1982); Cerkovnik, *The Sexual Abuse of Children: Myths, Research, and Policy Implications*, 89 Dick L. Rev. 691-719 (1985).

⁴¹ S. O'Brien, *Child Abuse: A Crying Shame* 18 (1980).

⁴² See e.g., D. Finkelhor, *Child Sexual Abuse: New Theory and Research* 47 (1984); Berliner, Blick, and Buckley, "Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development," in ABA National Legal Resource Center for Child Advocacy and Protection, *Child Sexual Abuse and the Law* (5th ed. 1984); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977 (1969).

⁴³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 271 (3rd ed. 1980).

ful vagina, stretched many times its normal size because [she was used] for sexual gratification."⁴⁴

Hundreds of photographs presented to the Commission on Pornography further illustrate the physical harm: "pitiful boys and girls with their rectums enlarged to accommodate adult males and their vaginas penetrated with pencils, toothbrushes, and guns."⁴⁵

The end-result of pedophiles acting-out pornographic sexual/sadistic depictions of children which they view can be death. One series of child pornography photographs shown to the Attorney General's Commission on Pornography "focused on a cute, nine-year old boy who had fallen into the hands of a molester. In the first picture, the blond lad was fully clothed and smiling at the camera. But in the second, he was nude, dead and had a butcher knife protruding from his chest."⁴⁶ Many cases have been reported in which a sex-related murder may have been patterned after a depiction found in a pornographic magazine or film.

Distribution and sale of child pornography harms children in ways which some researchers believe are more severe and long lasting than harm from production.⁴⁷ Child

⁴⁴ *Commission on Pornography* at 209. Health officials have been alerted for over a decade that infantile gonorrhea is an indicator of sexual assault. S. Sgroi, *Kids With Clap: Gonorrhea as an Indicator of Child Sexual Assault*, 2 *Victimology* 251-267 (1977); S. Sgroi, *Pediatric Gonorrhea Beyond Infancy*, 8 *Pediatric Ann.* 5 (1979).

⁴⁵ J. Dobson, "Enough is Enough," in *Pornography, A Human Tragedy* 116 (1986).

⁴⁶ *Commission on Pornography* at 505.

⁴⁷ The *Ferber* court noted as follows:

[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating

pornography has a life of its own. The depictions are timeless and may be distributed and circulated for years after they are initially created. Each time the pornography is exchanged the children involved are victimized again. The harm to children from pornography occurs as a result of the existence of the material itself.

B. Special Harm To Child Victims Demands Innovative "Reverse Sting" Operations To Stop The Devastation Which Child Pornography Causes To Children.

This Court in *Ferber* ruled that the state's "compelling" interest in protecting child victims from sexual exploitation through child pornography was of "surpassing importance." 458 U.S. at 757. This Court last year in *Osborne* held that mere private possession of child pornography could be proscribed and reaffirmed that "it is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" 495 U.S. ___, 110 S.Ct. at 1696 (quoting *Ferber*, 458 U.S. at 756-757).

State and federal courts have consistently recognized this legitimate state interest in regulating, and eliminating, child pornography because of its overwhelming harm to children. Last year Congress enacted The Child Protection Restoration and Penalties Enhancement Act of 1990, making it a federal crime to knowingly view or possess sexually explicit conduct involving minors.⁴⁸ The reasoning for such new federal legislation is clear:

The sexual exploitation of a child is one of the most heinous crimes any person can commit. Those who possess and view this material com-

within the mass distribution system for child pornography.

('[I]t is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions and increases the emotional and psychic harm suffered by the child'). *Ferber*, 458 U.S. at 759 n.10.

⁴⁸ Pub. L. 101-647, § 322, 104 Stat. 4816 (1990).

prise the market for this underground industry. Frankly, I am at a loss to find acts which are more despicable, heinous, and deserving of such serious penalties than the sexual exploitation of our young people. [This Act] is crucial to stemming the flow of vicious crimes against children and the exploitation of them. Penalties for the possession, viewing, and dissemination of this material will be a deterrent to those who would use children to produce this illicit material. Those who steal the innocence away from our children must face harsh punishment." Sen. Thurmond 136 Cong. Rec. S4728-02.

This Court can also make a strong statement to prevent such harms by upholding such undercover stings against child pornographers. The conclusion reached by the Los Angeles Police Department in its 1991 comprehensive sex offender study should be the watchwords for the decision: "pornography is a dangerous weapon in the hands of the pedophile and is used extensively in extrafamilial sexual victimization of children."⁴⁹

III. JACOBSON'S NUMEROUS POSITIVE RESPONSES INDICATE HIS INTEREST IN CHILD PORNOGRAPHY AND DEMONSTRATE THAT AS A MATTER OF LAW, NO ENTRAPMENT OCCURRED

A. Courts Have Recognized The Difficult Detection Of Child Pornographers Requires Sting Operations To Pierce The Underground, Clandestine Pedophile Network.

As previously discussed, research and law enforcement experience have clearly illustrated that the insidious nature of child pornography makes it difficult to detect. In addition, this Court has also emphasized the problem of apprehending child pornographers, where the very nature of the activity is clandestine. For example, the Court in *Osborne* noted this problem when Mr. Justice White, writing

⁴⁹ *Pornography and Sexual Abuse* at 20.

for the Court said, "... since the time of our decision in *Ferber*, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution." 495 U.S. at ___, 110 S.Ct. at 1697. Earlier, the Court also observed that "... the transmission of child pornography through the mails occurs within a shroud of secrecy..." *United States v. Johnson*, 855 F.2d 299, 305 (6th Cir. 1988), and the possibility of apprehending the violators through normal procedures is almost non-existent.

The problem of detection and the underground nature of child pornography also have been consistently emphasized by lower appellate courts' rulings on reverse stings involving child pornography. The Tenth Circuit Court of Appeals concluded: "... it was reasonable for the postal inspectors to assume that the only way they could ferret out suspected pedophiles 'was to encourage ... what was otherwise being done or what they thought was being done.'" *United States v. Esch*, 832 F.2d 531, 539 (10th Cir. 1987). Likewise, the Eighth Circuit Court of Appeals stated that "the nature of the production, distribution, and sale of child pornography itself justifies this type of undercover operation to be utilized against those who order it." *United States v. Musslyn*, 865 F.2d 945, 947 (8th Cir. 1989).

The reverse stings by the postal and customs authorities, of which Jacobson was a part, clearly were motivated by these deep concerns about the burgeoning underground network of pedophiles and child molesters who use child pornography. However, numerous precautions were taken to focus only upon those individuals who were involved in child pornography. The Postal Inspectors established strict guidelines to target only individuals who had some predisposition to receive or traffic in child pornography. In the petitioner's case, the inclusion of his name on *Electric Moon's* mailing list, the ordering of the magazines *Bare Boys I & II* and the request for the sexually explicit catalog illustrate his strong predisposition to obtain child pornog-

raphy. After gleaning petitioner's name from the above, the postal inspectors instituted an investigative procedure to determine whether Mr. Jacobson was in fact involved in buying child pornography. According to the record, "Jacobson responded *with interest* on eight occasions, "showing a strong predisposition to engage in the illegal conduct of purchasing child pornography." *United States v. Jacobson*, 916 F.2d 467, 468 (8th Cir. 1990) (emphasis added).

Despite this overwhelming evidence, Jacobson claims that he was entrapped *as a matter of law*—the only issue accepted for argument by the Court. In the instant case, the jury soundly rejected Jacobson's entrapment defense. Any judicial review of entrapment, as a matter of law, should focus on two issues: (1) whether the jury's rejection of the entrapment defense may be overturned; and (2) whether the defendant was entrapped as a matter of law.

B. Overturning The Jury's Rejection Of The Entrapment Defense Is Unwarranted In This Case.

It is well established that a jury finding on the issue of entrapment will not be disturbed unless no rational trier of fact could have found predisposition to exist beyond a reasonable doubt. *United States v. Hunt*, 749 F.2d 1078 (4th Cir. 1989), *United States v. Jannotti*, 673 F.2d 578 (3rd Cir.), *cert. denied*, 457 U.S. 1106 (1982).

To overturn the jury verdict, the Court must find that *uncontradicted* evidence viewed *in the light most favorable to the government* shows clearly that the government was the manufacturer rather than simply a detector of crime." *Jacobson*, 916 F.2d at 470 (emphasis added). In sum, a court "may overturn the jury's rejection of the entrapment defense *only if no reasonable jury* could have found that the government proved predisposition beyond a reasonable doubt based on the evidence at trial." *United States v. Jenrette*, 744 F.2d 817, 822 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) (emphasis added).

The only legitimate occasion for disturbing the jury's decision to reject the defense of entrapment occurs when the appellate court holds that as a matter of law, predis-

position was not proven beyond a reasonable doubt. See *Hunt*, 749 F.2d at 1078; *Jenrette*, 744 F.2d at 822; and *Jannotti*, 673 F.2d at 578. In *Hunt*, the Court said "predisposition is necessarily a nebulous concept, and has generally been held to be a question for the jury, unless the evidence is insufficient as a matter of law." 749 F.2d at 1085. To overturn the jury verdict, a very high burden must be overcome and "we must assume that the trier of fact drew all permissible inference[s] . . ." *United States v. Thoma*, 726 F.2d 1191, 1197 (7th Cir.), *cert. denied*, 467 U.S. 1228 (1984).

C. No Improper Inducement Nor Lack Of Predisposition Exists In The Instant Case To Find Entrapment As A Matter of Law.

The only proper manner to judge the merits of the jury's verdict is to compare their decisions with findings in other cases. While there are a significant number of reported cases concerning predisposition, it must be noted that before the threshold of entrapment as a matter of law may be broached, the Court must find that there is no dispute as to the credibility of witnesses or the interpretation of the evidence. *United States v. Gambino*, 788 F.2d 938, 944 (3rd Cir. 1986). In the instant case, there is a hot dispute as to the interpretation of the evidence and it is argued that the petitioner's own testimony lacks credibility.

Assuming *arguendo* that a review of the jury's decision is even justified, parameters for such review have been clearly established. Any examination must be two-fold because "... the Court has consistently adhered to the view ... that a valid entrapment defense has two related elements: (1) government inducement of the crime, and (2) a lack of predisposition . . ." *Matthews v. United States*, 485 U.S. 58, 60-61 (1988).

(i) Mail Correspondence Is Clearly Unobtrusive And Proper Inducement To Detect Such Crimes.

The first prong of the review is an examination of the inducement offered by the government. In *Jacobson*, the government on four different occasions corresponded with

the petitioner through the mail and on each occasion he responded affirmatively in some fashion. There never was a face-to-face meeting between agents of the United States and the petitioner. A review of the leading cases in this area indicate that inducement (or contact) that was far more invasive than in the present case was routinely upheld as not being improper government inducement. For example, in *United States v. Russell*, 411 U.S. 423 (1973), government agents had numerous meetings with the defendant and supplied a necessary ingredient in the production of the illegal substance and yet the Court ruled that this face-to-face inducement did not violate the first prong of the entrapment test. In *Hunt*, the undercover operatives went face-to-face with a judge and even played their parts as organized crime types to the hilt by threatening bodily harm and still the Court said that was not undue pressure. 749 F.2d 1078. See also *United States v. Williams*, 705 F.2d 603 (2d Cir. 1983).

In *United States v. Spivey*, 508 F.2d 146 (10th Cir. 1975), the government agent took a recently released convicted felon into his home, gave him money, charged him no rent, and supplied Spivey with marijuana on a regular basis in a scheme to catch Spivey in the sale of heroin. The court felt that even this almost unbelievable activity by a government agent was not such an undue inducement so as to defeat the jury verdict.

Three cases which found improper government inducement highlight why entrapment as a matter of law did not occur in the case at bar. *Sherman v. United States*, 356 U.S. 369 (1958), (face to face contacts and free gifts of narcotics to a known drug addict who is trying to break the habit); *Sorrells v. United States*, 287 U.S. 435 (1932), (face to face contact with an old "war buddy" who incessantly badgers Sorrells to produce illegal "whiskey," when he had never made whiskey before); and *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984), (defendant, who is prepared to engage in a legal transaction (the sale of a shotgun and detonator), is badgered by the undercover operative who insists that only a "pipe bomb" will suffice).

In *Jacobson*, all contacts were made by mail to which petitioner eagerly responded affirmatively though he was never told what to do and certainly never pushed to purchase any certain item. He was simply afforded the opportunity to order child pornography and only an affirmative action by him started the criminal activity. It is "... well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." *Sorrells*, 287 U.S. at 441. From a review of these cases, it is apparent that unless the inducement to commit the crime is much more compelling than simple mailings, the first prong of the entrapment review will not be met.

(ii) Eight Affirmative Responses From Jacobson Provide Ample Predisposition To Commit The Crime Of Receiving Child Pornography.

The second prong is closely related in that, "predisposition may be proved by showing that the defendant 'responded affirmatively to less than compelling inducements ...'" *Jenrette*, 744 F.2d at 822-823 citing *United States v. Burkley*, 591 F.2d 903, 916 (1978); see also *Gambino*, 788 F.2d at 945 citing *United States v. Viviano*, 437 F.2d 295, 299 (2d Cir.), cert. denied, 402 U.S. 783 (1971).

An understanding of predisposition is not complete unless one is cognizant that certain violations of the law are significantly more difficult to detect than other types of violations. The court recognized this factor in *Russell*, 411 U.S. 423 (1973) (illicit sale of narcotics); *Williams*, 705 F.2d 603 (1983), (bribes taken by government officials); and *Esch*, 832 F.2d 531 (1987), (distribution of child pornography).

As previously discussed, the pedophile, child pornographer or child molester does not sexually abuse children, produce or trade or collect pornography, or practice his seduction techniques in the light of day. The law enforcement officers must be permitted to use "stealth and strategy" to apprehend such violators. *Sherman*, 356 U.S. at

372. See also *Grimm v. United States*, 156 U.S. 604 at 609-610 (1895). "The appropriate object of this permitted [undercover] activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law." *Sorrells*, 287 U.S. at 441-442.

This perspective was advanced by the various courts that heard the *Abscam*⁵⁰ cases. *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 908 (1983). In those cases, the courts were confronted with men in positions of trust and honor and agreed that there was not a way to detect such criminal behavior save putting out inducements and seeing who would rise to the bait. *Kelly*, 707 F.2d at 1473-74.

In *Jannotti*, the Court felt so strongly about the difficulty of detecting certain crimes that even absent prior indicia of predisposition, the "... very acceptance of a bribe by a public official may be evidence of predisposition" 673 F.2d at 604. The parallel to petitioner's case would be that those who order sexually oriented material of children by mail expose their predisposition. Contrary to *Jannotti*, the petitioner in this case was sent a mailing, albeit more than one, and on every occasion responded affirmatively in some fashion. Using the *Jannotti* reasoning, the final action of ordering and paying for child pornography in *Jacobson* is, in and of itself, adequate proof of predisposition, regardless of the other seven positive responses.

A final insight from the *Abscam* case may be extracted from *United States v. Myers*, 635 F.2d 932, 939 (2d Cir. 1980), *cert. denied*, 449 U.S. 956 (1980), where the Court

⁵⁰ *Abscam* was an FBI undercover sting operation that derived its name from the first two letters of *Abdul Enterprises* and "scam" (meaning a plan or hoax). *Abdul Enterprises* was a fictitious organization created by the FBI to ferret out law makers predisposed to abusing their power for financial gain.

discusses the clandestine nature of the crime and the pitfalls of the investigation. "Any member of Congress approached by agents conducting a bribery sting can simply say 'No.' Each member's capacity to reject bribe opportunities could be regarded as sufficient safeguard against risk" 635 F.2d at 939. Was not the same true of Jacobson? Just as the members of Congress (who do not advertise their skulduggery) are susceptible to their predisposition by rising to the bait, so is the child pornographer susceptible to his own proclivities and, by that predisposition, subject to legitimate apprehension.

In the present case, Jacobson received two sexually explicit brochures from Customs and Postal and, in both cases, ordered obviously graphic depictions of child pornography. Faced with this damning evidence, the petitioner's only defense is that his delay in ordering the blatantly explicit magazines negates his predisposition. However, the truth is that petitioner had already exhibited his predisposition when he ordered *Bare Boys I & II* from *Electric Moon*. "Furthermore, the mailings of CSF were spread out over a period of time and, unlike personal contact, could easily be ignored by one not interested in their contact." *Thoma*, 726 F.2d at 1197. If Jacobson had wanted no part of the procedure, he could have done just as the courts in *Thoma* and *Myers* suggested: *just say no*. "Nobody forced [the defendant] to join CSF or to order illegal materials. The government did nothing more than give [the defendant] an opportunity to exercise his predisposition to collect child pornography." *Musslyn*, 865 F.2d at 947 ("Project Looking Glass"). Petitioner's complaint of a lack of predisposition rings hollow in light of these cases, which demonstrate that the true evidence would have been ignoring the mailings.

Other cases involving reverse stings of child pornography uphold this proposition about predisposition. In *United States v. Mitchell*, 915 F.2d 521 (9th Cir. 1990), the Ninth Circuit Court of Appeals found sufficient predisposition based on a previous purchase of a child pornography magazine by the defendant. In that case, the magazine was

ordered from a known distributor of pornography, Catherine Wilson, and was entitled, *Skoleborn School Children*. Likewise, in the present case, petitioner ordered from a known distributor of pornography (*Electric Moon*) *Bare Boys I & II*, titles which at a minimum indicate child erotica. The other factor which influenced the *Mitchell* court was the lack of coercive behavior by the government. As in other "inducement" cases, the court felt simple mailings were not significant nor coercive inducements, an observation with which the jurors in the instant case must have agreed.

In *United States v. Goodwin*, 854 F.2d 33 (4th Cir. 1988), the defendant came to the attention of postal inspectors through an advertisement he had placed in a magazine.⁵¹ Petitioner argues that his behavior does not rise to the level of sufficient predisposition. However, was Goodwin's predisposition more evident from the advertisement than was Jacobson's by the ordering of the magazines, *Bare Boys I & II*? Unless one understands the language of the pedophile or child pornographer, phrases such as "Lolli-tots," "Moppets," "Lolita," or "Piccolo" probably would mean less and certainly no more than does the title *Bare Boys*. Ironically, Goodwin consummated his dealings with the postal inspector by ordering the exact same magazine, *Boys Who Love Boys*, that petitioner had ordered. The Fourth Circuit used the "masked" advertisement, coupled with the defendant's response to the mailing (in which he said he was interested in teenage and pre-teenage sexual activity and ordered *Bare Boys*) to find "substantial previous evidence of predisposition." *Goodwin*, 854 F.2d at 35.

In *United States v. Driscoll*, 852 F.2d 84 (3rd Cir. 1988), the defense argued "outrageous government conduct" which this Court has said is the last resort for the defense if an entrapment argument fails because of predisposition.

⁵¹ Wanted: Lolli-tots, moppets and chicken magazines and photographs. If you have single copies you want to sell, send you telephone number to MP Code 3941. See *United States v. Goodwin*, 854 F.2d at 34.

Russell, 411 U.S. at 431-432 citing *Rochin v. California*, 342 U.S. 165 (1952). Since the parallels between Driscoll's and Jacobson's predisposition are remarkable, it is noteworthy that both the court and the defense in *Driscoll* readily accepted the predisposition of the defendant. First, Driscoll had previously ordered "child erotica," just as petitioner had done. Second, both names were found on mailing lists of known pornographers. Finally, the postal authority sent inquiries to both individuals that eventually led to the order, payment and delivery of the child pornography.

"... [T]he most important element of the [predisposition] equation is whether the defendant was reluctant to commit the offense." *Thoma*, 726 F.2d at 1197. In *Thoma*, the defendant was sent two initial mailings by the postal authority to which he did not respond. This differs greatly from petitioner's behavior in that he affirmatively responded to both initial mailings by requesting information and indicating an interest in teenage sexuality. The defendant in *Thoma* does not order any child pornography until there have been at least eight contacts and at least two refusals to respond. Petitioner, on the other hand, responded on all four contacts and ordered the child pornography simply in response to a mailing. The court in *Thoma* ruled that predisposition existed even though much reluctance was demonstrated. If *Thoma* is used as a measuring stick, petitioner's behavior exhibits no reluctance and predisposition abounds.

In summary, entrapment can only be established as a matter of law when the *presence* of outrageous, intrusive and overbearing government inducements and the *absence* of petitioner's predisposition to commit a crime is apparent from the *uncontradicted evidence*. *Jacobson*, 916 F.2d at 470, citing *Thoma* 726 F.2d at 1197. See also *Russell*, 411 U.S. at 431-432; *Sorrells*, 287 U.S. at 442; *Sherman*, 356 U.S. at 369. The prior ordering of two magazines featuring teenage nudity and sexually explicit activity, and orders for brochures indicating other places to obtain child pornography and child erotica from known pornographers pro-

vide ample evidence of predisposition. Similarly, his consistent affirmative responses to undercover mailings indicating his interest in child pornography underscore his predisposition in this case. Clearly, offering someone through the mail an opportunity to purchase obviously illegal material, *Boys Who Love Boys*⁵² is not improper inducement. When the opportunity was finally presented to obtain child pornography, Jacobson eagerly rose to the bait, not once but twice, to order from undercover postal and customs authorities.

Finally, Jacobson's conviction by a jury of his peers should not be disturbed. The jurors heard all the testimony and are in the best position to weigh the evidence, resolve conflicts if any exist, and ascertain the truth concerning whether a crime exists. Any second guessing by the Court usurps the jury's province and substantially erodes law enforcement's ability to stop "these harms [from child pornography] which collectively are consequential damages that flow from the trespass against the dignity of the child." *United States v. Weigand*, 812 F.2d 1239, 1245 (9th Cir. 1987).

CONCLUSION

The Eighth Circuit Court of Appeals' decision in the present case should be upheld because there is no entrapment as a matter of law and such undercover "reverse stings" are essential to discover and eliminate child pornography and the sexual exploitation of children.

⁵² Described as "eleven year old and fourteen year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this."

Respectfully submitted,

JUDITH DRAZEN SCHRETTER H. ROBERT SHOWERS
National Center for Missing (Counsel of Record)
and Exploited Children

2101 Wilson Boulevard
Suite 550
Arlington, Virginia 22201
(703) 235-3500

GENE L. MALPAS
National Law Center for
Protection of Children and
Families
1800 Diagonal Road
Suite 500
Alexandria, Virginia 22313
(703) 684-2011

APPENDIX

APPENDIX**DESCRIPTION OF AMICI****The National Center for Missing and Exploited Children**

The National Center of Missing and Exploited Children (the "Center") is a non-profit, tax-exempt corporation chartered in the District of Columbia in 1984, with goals of decreasing the incidence of crimes against children, effecting positive changes in public law and policy, encouraging an awareness of the significance of all crimes against children, and assisting families and those who seek to protect children. The Center works in cooperation with the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice in coordinating the efforts of law enforcement, social service agencies, elected officials, judges, prosecutors, educators, and the public and private sectors on child protection issues.

The Center has been funded by the Office of Juvenile Justice and Delinquency Prevention since 1984 to implement tasks under the Missing Children's Assistance Act (42 U.S.C. §§5771-5777), including operation of the national toll-free hotline for reports of missing children; operation of the national resource center and clearinghouse for prevention, investigation, prosecution, and treatment of the missing and exploited child case; and assistance to OJJDP in performing its task of coordinating federally funded programs related to missing children. The Center actively assists federal and state law enforcement agencies' efforts to reduce the incidence of sexual exploitation, including passing reports of child pornography received on the hotline to agents of the U.S. Customs Service and local police departments for investigation. The Center provides information on specific federal and state statutes and legislation affecting children, including child pornography laws, state missing children clearinghouses, non-profit organizations, and interested child advocates, and training to professionals.

National Law Center for Protection of Children and Families

National Law Center for Protection of Children and Families ("National Law Center") is a Washington D.C. metro based organization dedicated to the protection of children and the preservation of families through the enforcement of existing laws and the promulgation of new legislation against illegal pornography and sexual exploitation.

Through the legal staff, resource library, and publications, the National Law Center actively participates in assisting courts, prosecutors, investigators, legislators, public officials, researchers, and parents to stop illegal pornography and its concomitant harms of sexual exploitation of children, women, and families.

Consultation with many county, city and civic leaders around the nation allows the National Law Center to assist in the drafting and enactment of new legislation. This legislation concerns obscenity, child pornography, materials harmful to minors and the appropriate time, place and manner regulation of sexually oriented businesses. The National Law Center is also involved in the dissemination of vital information to legislators, law enforcement, public officials and concerned citizens alike.

Seminars, newsletters and updated prosecutors' manuals are part of the National Law Center's strategy. This strategy is dedicated to equipping law enforcement with the necessary information, pleadings, and legal techniques necessary to win the war for our children and families.

The National Law Center has participated in numerous *Amici Curiae* briefs in cases that have a direct impact on children and family issues, including the recent Supreme Court cases of *Osborne v. Ohio* and *Maryland v. Craig*. Presently, the National Law Center is involved in publishing training materials and reference manuals on child sexual exploitation and pornography. Its legal staff has conducted legal and law enforcement training for thousands of investigators and prosecutors since 1984.

The National Coalition Against Pornography

The National Coalition Against Pornography ("N-CAP") was founded in 1983 by Dr. Jerry R. Kirk to respond to the devastating impact of illegal obscenity and child pornography on America. N-CAP holds that these materials have a direct relationship to the skyrocketing incidence of rape, sexual violence and child molestation in the United States. Numerous respected studies confirm this opinion.

With members representing over 50 religious groups, denominations, citizen action groups and foundations, N-CAP works to increase public awareness of the harm caused by obscenity and child pornography and to implement a number of programs designed to eliminate them from our society.

These programs include educational/training seminars designed to teach citizens and law enforcement officials how to rid their communities of illegal obscenity and child pornography. Other programs include: victim service development training; the S.T.O.P.! Campaign (Stand Together Opposing Pornography, an intensive media-based campaign developed by N-CAP to help local communities push for the elimination of illegal obscenity/child pornography through law enforcement); legal and law enforcement training on obscenity and child pornography investigations and prosecutions; extensive resource development and distribution, including a wide range of research reports documenting the harm of obscenity and child pornography; expert testimony for federal and state legislatures that are considering stronger obscenity and child protection laws. N-CAP founder, Dr. Jerry Kirk, provided testimony before both the U.S. House of Representatives and the U.S. Senate in support of the Child Protection and Obscenity Enforcement Act of 1988.

Each of N-CAP's programs is active on a national basis, with specific involvement in dozens of local cities at any given time. N-CAP has also been instrumental in the development of a number of other related groups. N-Cap was the catalyst in the founding of the Religious Alliance

Against Pornography (RAAP) in 1986. RAAP consists of the highest level leadership of nearly fifty denominations, faith groups and inter-faith organizations, all united around the single common objective of eliminating hardcore and child pornography. Members include leaders in the Roman Catholic, Jewish, Protestant, Greek Orthodox and Mormon communities which represent over one million individuals throughout the United States. Dr. Kirk, president of N-CAP, also serves as the Chairman of RAAP.

The fundamental mission and purpose of N-CAP is in protecting children and families through the elimination of child pornography and obscenity. N-CAP was formed as a result of a group of local citizens and ministers in Cincinnati, Ohio who had seen and counseled firsthand hundreds of families devastated by illegal pornography. N-CAP has provided substantial efforts nationwide in support of the enforcement of the statute before the Court.

National Family Foundation

National Family Foundation (the "Foundation") is a non-profit organization which was organized to collect, synthesize, and integrate medical, clinical, and social science evidence and theory from the United States and Europe. Its purpose is to bring greater understanding to the problems of the American family and to develop guidelines for healthy parenting and successful child rearing.

The Foundation analyzes research findings in the light of their larger implications to society. It encourages those who have been successful in clinical practice to apply what they have learned in their counseling rooms to larger societal problems. It explores the links between family, character, culture, and media.

Athletes For Kids

Athletes For Kids ("AFK") is a non-profit organization started in 1986 in the Commonwealth of Virginia by Brad Curl to address the illicit sex and pornography problem among teenagers with positive, demand reduction solu-

tions. AFK represents over 200 top professional athletes and dozens of leading corporate executives who are concerned about the destructive impact of a ten billion dollar per year pornography industry which exploits women, children and men. AFK has produced a video to use in school assemblies featuring the athletes and introduced it in a nine city campaign in the spring of 1989. AFK will be showing the video in hundreds of schools in the coming year and holding leadership meetings in cities coast to coast. AFK's main purposes are to educate young people, train athletes to speak on the destructive effects of pornography and pre-marital sex and to rally city leaders to make a stand against pornography in their communities.

AFK is very concerned that the government does its job in prosecuting obscenity, child pornography and child exploitation and enforcing regulations against indecent broadcasts and telephone services.

AFK believes that the criminal laws against the possession of child pornography and aggressive enforcement such as reverse stings will significantly curtail child molestation and related harms which are inflicted upon America's besieged children.